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No. 91-1314

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM T. MURPHY, PETITIONER

v.

PHILIP C. MARCUM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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17

QUESTION PRESENTED

Whether the court of appeals correctly held that the *Feres* doctrine bars petitioner's lawsuit against his former superior officers for disciplinary action they took against him while he was on active military duty, allegedly in retaliation for his having written to a member of Congress.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Bivens v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 4, 5-6
Brown v. *Glines*, 444 U.S. 348 (1980) 2, 9
Brown v. *United States*, 739 F.2d 362 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985) 7, 8
Bush v. *Lucas*, 462 U.S. 367 (1983) 6
Chappell v. *Wallace*, 462 U.S. 296 (1983) 5, 6, 9, 10
Durant v. *Neneman*, 884 F.2d 1350 (10th Cir. 1989), cert. denied, 493 U.S. 1024 (1990) 8, 9
Feres v. *United States*, 340 U.S. 135 (1950) 4, 5, 6, 12
Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 11
United States v. *Brown*, 348 U.S. 110 (1954) 7
United States v. *Muniz*, 374 U.S. 150 (1963) 7
United States v. *Stanley*, 483 U.S. 669 (1987) 4, 6, 10, 12

Constitution and statutes:

U.S. Const.:
- Art. I 12
  - § 8, Cl. 14 12
- Amend. I 4
- Amend. V 4

Uniform Code of Military Justice, 10 U.S.C. 901 *et seq.*:
- 10 U.S.C. 938 (art. 938) 7
- 10 U.S.C. 1034 (1982) 5, 9, 10, 11
- 10 U.S.C. 1034(b)-(e) (1988) 11

Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 4

Miscellaneous:

Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181 (1962) 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A17) is unreported. The decision of the district court (Pet. App. A18-A30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1991. The petition for a writ of certiorari was filed on January 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns petitioner William Murphy's claim that, while he was on active duty in the United States Army, he was wrongfully disciplined by his superior officers.

1. In May of 1988, petitioner was a staff sergeant at the Aberdeen Proving Grounds in Maryland. Petitioner possessed a top secret security clearance and worked in military intelligence. A white female private, Melissa Unkenholt, told petitioner that respondent Captain Sheila O'Connor, petitioner's immediate commanding officer, had telephoned Unkenholt's parents on two occasions to express reservations about Unkenholt's plans to marry a black man. Petitioner was disturbed by this allegation and drafted a petition denouncing O'Connor's actions. He intended to circulate the petition among the troops and to present it to the post's Equal Opportunity Office for investigation, although valid military regulations prohibited the circulation of such petitions. See *Brown* v. *Glines*, 444 U.S. 348 (1980).

On May 20, 1988, Group Sergeant Major Chester Leeth assembled the noncommissioned officers in petitioner's company and told them that he regarded the petition as mutinous. Pet. App. A38. A short time later, respondent Lieutenant Colonel Philip Marcum, the group commander, ordered a full investigation of the circumstances surrounding the petition. *Id.* at A39. As a result of the investigation, Marcum reprimanded petitioner on August 3, 1988, for making false accusations of racism against O'Connor. *Ibid.* Marcum told petitioner that, absent further problems involving petitioner, the reprimand would conclude the matter. *Ibid.* Petitioner then went on leave for a period of 30 days. *Id.* at A40.

Sometime before petitioner went on leave, he had initiated an Inspector General investigation and a congressional inquiry concerning a separate, unrelated matter in Marcum's chain of command. Pet. App. A40. Marcum learned of these inquiries when the Department of the Army consulted him in the preparation of the Army's response to a letter from the office of petitioner's United States Senator. At that time, petitioner was still on his 30-day leave in August. *Ibid.*

When petitioner returned from leave on September 6, 1988, he learned that Marcum had relieved him of his duty assignment and had suspended his security clearance. Pet. App. A42. Marcum informed petitioner that he was recommending revocation of petitioner's security clearance. *Ibid.* Respondent Captain Daniel M. Baughman, who had succeeded O'Connor as petitioner's immediate superior officer during petitioner's absence, referred petitioner for a mental evaluation. *Id.* at A43. Pursuant to Baughman's referral, respondent Major Dean M. Rueckert, Chief of Community Health Services at Aberdeen, evaluated petitioner and diagnosed him as suffering from "an '[o]ccupational [p]roblem with passive aggressive traits.'" *Id.* at A44. Rueckert's report was sent to Army authorities for use in evaluating the suspension of petitioner's security clearance. *Ibid.*

In the spring of 1989, petitioner was given orders transferring him to Korea. Pet. App. A45. When petitioner inquired about the status of his security clearance, he was given the option of going to Korea without resolving the matter or resigning. *Ibid.* Petitioner chose to resign. *Id.* at A46.

2. Petitioner instituted this action in district court against respondents Marcum, O'Connor, Baughman

and Rueckert in their individual capacities, asserting a state law claim of defamation and two damages claims for constitutional torts under *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The amended complaint asserts that respondents conspired to "force his resignation" in violation of his rights under the Fifth Amendment and to "retaliate against him for petitioning to his elected representatives" in violation of his First Amendment rights. Pet. App. A47.

Respondents moved to substitute the United States as the party defendant and to dismiss the complaint for failure to state a claim. Accepting the allegations of the amended complaint as true for purposes of the motion, the district court substituted the United States and granted the motion to dismiss, holding that "neither [petitioner's] defamation claim nor his constitutional claim are legally cognizable in this action." Pet. App. A24. Under this Court's decisions in *Feres* v. *United States*, 340 U.S. 135, 146 (1950), and *United States* v. *Stanley*, 483 U.S. 669, 684 (1987), the district court explained, "the sole question presented here is whether the injuries which [petitioner] claims [to have suffered] were 'incident to military service.'" Pet. App. A25. It held that they were: "The very gist of [petitioner's] complaint," the court concluded, "is that he was wrongfully disciplined." *Id.* at A28. Because resolution of petitioner's claims on the merits would necessarily require it to "second-guess military decisions," the district court held that dismissal of petitioner's complaint was required. *Id.* at A28, A30.

3. The court of appeals affirmed. Pet. App. A4-A17. It held, in accord with *Feres* and its progeny, that the United States is not liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, and

that superior officers are not liable under *Bivens*, 403 U.S. 388, "for injury to service personnel where the injuries arise out of or are in the course of activity incident to service." Pet. App. A12. The court also rejected petitioner's argument that respondents' actions interfered with his right to communicate with a member of Congress as provided for in former Section 1034 of 10 U.S.C. (1982), stating:

> Section 1034 provides that a service person may write a member of Congress without sending the communication through official channels. This right was not interfered with. He wrote his letter without sending it through official channels.

Pet. App. A14-A15. Concluding that "[t]he facts of this case as alleged by [petitioner] bring it clearly within the *Feres* doctrine," the court of appeals affirmed the judgment of the district court. *Id.* at A17.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or any court of appeals. As the Fourth Circuit observed below, this case requires only the application of clear principles that have been "restated and [re]affirmed numerous times" by this Court and the courts of appeals. Pet. App. A12. Further review is therefore unwarranted.

1. In *Feres* v. *United States*, 340 U.S. 135, 146 (1950), this Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. *Chappell* v. *Wallace*, 462 U.S. 296, 305 (1983), extended that holding to bar recovery for constitutional torts under *Bivens* v. *Six Unknown*

Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), reasoning that the military's unique disciplinary structure, coupled with Congress' provision of a "comprehensive internal system of justice * * * for the review and remedy of complaints and grievances such as those presented by [enlisted men]," constituted " 'special factors' which dictate[d] that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." *Chappell*, 462 U.S. at 302, 304 (citing *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)). The military, it concluded, must be permitted "to deal with its own personnel" because "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." *Chappell*, 462 U.S. at 305 (quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962)). This Court subsequently "reaffirm[ed]" that conclusion and reasoning in *United States* v. *Stanley*, 483 U.S. 669, 683-684 (1987), holding once again that "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service.' " *Id.* at 684 (quoting *Feres*, 340 U.S. at 146).

There can be no doubt that the injury petitioner alleges here in fact "ar[o]se out of" and was inflicted "in the course of activity incident to service." *Feres*, 340 U.S. at 146. As the district court pointed out, "[t]he very gist of [petitioner's] complaint is that he was wrongfully disciplined." Pet. App. A28. It goes without saying that military discipline is an integral part of, arises out of, and is incident to military service; in fact, it lies at the heart of the *Feres* doctrine. As this Court has explained, the *Feres* doctrine prevents the courts from interfering with mili-

tary discipline and the "peculiar and special relationship of the soldier to his superiors." *United States* v. *Muniz*, 374 U.S. 150, 162 (1963) (quoting *United States* v. *Brown* 348 U.S. 110, 112 (1954)). Because petitioner's suit asks the courts to interfere in that relationship by second-guessing disciplinary actions, the decisions below declining to entertain the suit were undeniably correct.[1]

2. Petitioner cites two court of appeals decisions that he claims are in conflict with the decision below. Pet. 28-31. Both decisions are, in fact, entirely consistent with the Fourth Circuit's decision in this case.

In *Brown* v. *United States*, 739 F.2d 362 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985), several noncommissioned officers subjected a black soldier to a mock lynching at an off-duty party; the victim later became so depressed that he attempted suicide. His conservator brought a suit against the United States, the soldiers who participated in the lynching, and the commanding officer for civil rights violations. While

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[1] There are other procedures for dealing with improper discipline. Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938, provides:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Thus, petitioner was not without a remedy; he just failed to invoke it.

upholding the dismissal of the FTCA and constitutional tort claims against the United States and the superior officers as barred by *Feres*, the Eighth Circuit held that the individual soldiers who participated in the incident were subject to suit: Reasoning that "the preservation of military discipline is at the heart of the *Feres* doctrine," 739 F.2d at 368, the court stated that "[t]he activity that is at issue in this claim is of a distinctly non-military nature: the alleged participation of a group of men at a holiday weekend drinking party in the mock lynching of a young black man." *Id.* at 369. In contrast, the act petitioner complains of here—being disciplined by a superior officer—is uniquely military in nature. In fact, the *Brown* court expressly so recognized: Under the *Feres* doctrine, the court explained, the judiciary may not "second-guess the military decisions as to how an investigation into a disciplinary matter should have been conducted." *Ibid.* Petitioner here seeks precisely the type of judicial "second-guessing" that the *Brown* court recognized as prohibited.

Nor is the decision below inconsistent with the Tenth Circuit's decision in *Durant* v. *Neneman*, 884 F.2d 1350 (1989), cert. denied, 493 U.S. 1024 (1990). In *Durant*, a service member driving his personal vehicle struck and injured two other service members on a military base while driving to his duty station. In holding that plaintiffs' negligence actions against the driver were not barred by *Feres*, the Tenth Circuit held that the soldier's mere act of driving to his duty station was not a "military act" that would implicate the function or authority of the military. 884 F.2d at 1353-1354. But *Durant* does not even remotely suggest that disciplining an allegedly mutinous officer such as petitioner is not a

"military act" implicating military authority. On the contrary, the *Durant* court explained that "civilian courts have a legitimate concern for protecting the harmony of the military establishment to prevent an erosion of discipline." *Id.* at 1354. Clearly, "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel * * * would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." *Id.* at 1353 (quoting *Chappel*, 462 U.S. at 304). Accordingly, the appeals court ruling below does not conflict with *Durant*, either.

3. Petitioner seeks to avoid clear Supreme Court precedent and consistent circuit authority by arguing that a federal statute, former 10 U.S.C. 1034 (1982), takes his complaint outside the *Feres* doctrine. See Pet. 23-24. Specifically, petitioner contends that the discipline he received was, in law, not "incident to service" because his superiors violated 10 U.S.C. 1034 by imposing it in retaliation for his communication with a member of Congress. Neither 10 U.S.C. 1034 nor reason supports petitioner's argument.

a. At the time the events in this case took place, 10 U.S.C. 1034 (1982) provided:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

Congress enacted former Section 1034 "to ensure that an individual member of the Armed Services could write to his elected representatives without sending his communication through official channels." *Brown* v. *Glines*, 444 U.S. 348, 359 (1980). But

nothing in Section 1034 indicates a congressional intent to create a judicial remedy where, under the *Feres* doctrine, none would otherwise exist. Section 1034 does not mention damages awards. Nor does it state that military discipline is reviewable in federal court. And nowhere does it state that discipline allegedly imposed in violation of its directives is "deemed" not "incident to service." On the contrary, as this Court pointed out in *Stanley*, statutes such as Section 1034 are "designed to halt or prevent the constitutional violation[s] rather than [to permit] the award of money damages" after they occur. 483 U.S. at 683. Section 1034 therefore provides no support for petitioner's arguments.

Indeed, petitioner's argument proves far too much. If petitioner's argument were correct, any military act allegedly committed in violation of federal law would cease to be "incident to service." But that is not the law. Instead, even injuries imposed as a result of clearly unconstitutional conduct—acts undertaken in violation of the *supreme* law of the land—can produce "injuries incident to service" that are non-compensable under *Feres*. See, *e.g.*, *Stanley*, 483 U.S. at 669; *Chappell* v. *Wallace*, 462 U.S. at 296. If an action's unconstitutionality does not take it outside the *Feres* doctrine, a fortiori its mere illegality will not either; instead, there must also be an indication that Congress intended to create a damages remedy. As explained above, there is no evidence of such an intent here.

b. But even if petitioner's interpretation of Section 1034 were arguable—which it is not—the issue would still not warrant review by this Court. Section 1034 was amended in 1988 to provide a comprehensive remedial scheme for incidents of retaliation

like that alleged by petitioner here. See 10 U.S.C. 1034(b)-(e) (1988). Whatever the circumstances before the 1988 amendment, it is now clear that the statute's administrative scheme, not a *Bivens*-type action in federal court, is the proper remedy for the type of wrong petitioner alleges. *Schweiker* v. *Chilicky*, 487 U.S. 412, 423-429 (1988) (no *Bivens* remedy where the "design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms."). Because the prior version of Section 1034 is unlikely to be at issue in many future cases, this Court's consideration of its interplay with the *Feres* doctrine is unwarranted.

4. Finally, petitioner argues that this Court should grant certiorari "to determine for the lower federal courts when, if at all, Congress may, by its own enactments, counter and undermine any judicial imputation of its intent to confer upon constitutional tort-feasors in the military an immunity from suit by the soldiers subject to injury." Pet. 44. But the issue of how Congress may override the *Feres* doctrine is not presented by this case: As explained above, Section 1034 does not represent an attempt to do so; it does not evidence an intent to create a damages remedy that would otherwise be barred by *Feres*.

In any event, if the issue were presented here, further review would still be unnecessary because this Court has already offered sufficient guidance. In *Stanley*, this Court explained:

> Today, no more than when we wrote *Chappell*, do we see any reason why our judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to FTCA suits, where we adopted an "incident

> to service" rule. In fact, if anything we might have felt freer to compromise military concerns in the latter context, since we were confronted with an explicit congressional authorization for judicial involvement that was, on its face, unqualified; whereas here we are confronted with an explicit constitutional authorization for *Congress* "[t]o make Rules for the Government and Regulation of the land and naval forces," U.S. Const., Art. I, § 8, cl. 14, and rely upon inference for our own authority to allow money damages.

483 U.S. at 681-682 (footnote omitted). Thus, it is clear that Congress may overrule *Feres* and *Chappell* by "mak[ing] Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, which provide damages remedies to compensate service members for service-related injuries. It simply has chosen not to do so. This Court decided *Chappell* nearly a decade ago, and *Feres* more than three decades before that. Surely, if Congress had intended superior officers to be subject to damages suits by their subordinates for constitutional torts, it would have acted by now to correct this Court's misapprehension. Cf. *Feres*, 340 U.S. at 138 (Congress "possesses a ready remedy" to correct the Court's interpretation of the FTCA).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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